90-437

No. 90-

In the

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIS A. GROTE,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., FRED VANHOOSEN, DOUGLAS HEGGIE, LAWRENCE MARINELLI, M.D., BRADFORD BERG, and DOES 1 through 100, inclusive,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Howard D. Finkelstein

Finkelstein & Associates
Suite 400
1495 Pacific Highway
San Diego, California 92101
(619) 238-1333

Attorneys for Petitioner

September 12, 1990

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

QUESTION PRESENTED

Did the court of appeals err in holding that petitioner's state law retaliatory discharge claim was preempted because petitioner worked in an industry subject to the Railway Labor Act, when the identical claim would not be preempted if petitioner had worked in an industry subject to the Labor-Management Relations Act?

PARTIES TO THE PROCEEDING

All parties in the courts below are listed in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page:

Page

Page

STATUTES

In the

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-

HARRIS A. GROTE,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., FRED VANHOOSEN, DOUGLAS HEGGIE, LAWRENCE MARINELLI, M.D., BRADFORD BERG, and DOES 1 through 100, inclusive,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Harris A. Grote petitions the Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The oral opinions and written orders of the district court are unreported, and appear at pages 10a to 23a of the Appendix ("App. 10a-23a"). The opinion of the court of appeals is reported at 905 F.2d 1307, and is set forth at App. 1a to 9a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of Grote's claims on June 14, 1990. This Court has jurisdiction of this case under 28 U.S.C. § 1254.

STATUTE INVOLVED

Section 3 First, of the Railway Labor Act, 45 U.S.C. § 153 First, provides as follows in pertinent part:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the [National Railroad Adjustment Board] with a full statement of facts and all supporting data bearing upon the disputes.

STATEMENT

A. Facts.

According to the allegations of the complaint, which must be taken as true on review of the lower courts' dismissal for failure to state a claim upon which relief may be granted, petitioner Harris Grote was employed as a pilot for twenty years by respondent Trans World Airlines ("TWA"). In January 1984, petitioner had chest pains, later diagnosed as a mild heart attack, while piloting a passenger flight, and was forced to make an emergency landing. The Federal Aviation Administration ("FAA") suspended petitioner's pilot's license as a result of his heart condition, and petitioner undertook a course of medical treatment, during which he followed all of the instructions given him by his doctor. However, petitioner suffered further chest pains, and the FAA refused to recertify him as medically fit to operate a commercial aircraft. Recognizing his

inability to pilot an airplane safely, petitioner sought a disability retirement.

Meanwhile, in December 1984, respondent Marinelli, a doctor employed by TWA, told petitioner that TWA would pay no further medical benefits for him and that he would have to apply for medical certification from the FAA in order to assume duties as a pilot. In order to obtain that certificate, Marinelli told him that he would have to provide false information to the FAA about his medical condition, which he declined to do. The FAA did tell petitioner, in August, 1985, that he might be recertified if he undertook a "high risk" procedure to determine the cause of his condition, but that, given the high risk, petitioner should submit to the procedure only if his personal physician concurred. In fact, his physician advised against the procedure. Pursuant to respondent TWA's instructions, petitioner sought reconsideration of the denial of his medical certification, but he refused to submit false information about his medical condition that would have ensured that the certification would be granted.

Implementing respondent Marinelli's threat, respondent Bradford Berg, a TWA manager, denied petitioner's request for medical retirement status on December 5, 1985, and terminated his disability income benefits purportedly for lack of evidence to support his claim of illness. However, according to the allegations in the complaint, the termination was in retaliation for petitioner's refusal to perjure himself by providing false information to the FAA.

In January, 1986, the FAA advised petitioner that reconsideration was denied. On March 13, 1986, respondent VanHoosen, a TWA manager, terminated petitioner's employment, purportedly for abuse of sick leave, but actually in retaliation for petitioner's refusal to commit perjury by lying to the FAA about his medical condition.

The pilots who fly for respondent TWA, including petitioner, were represented in collective bargaining by the Air Line Pilots Association ("ALPA"), which negotiated a collective bargaining agreement ("CBA") to cover the pilots' employment. Petitioner grieved his discharge and the denial of medical benefits, and ALPA arbitrated these claims. Following hearings in July and August, 1986, the System Board of Adjustment determined that petitioner's discharge, and the termination of his medical leave, violated the CBA, but declined to rule on his claim for disability retirement on the ground that the retirement board, not the System Board of Adjustment, must arbitrate those claims, an arbitration that is still pending.

B. Proceedings Below.

On March 12, 1987, after the arbitration was concluded, petitioner filed this action in the California Superior Court for the County of San Diego. Petitioner alleged that his discharge violated the CBA but that the arbitration had not provided a complete remedy. Petitioner further alleged that he had been discharged, and his medical benefits terminated, in retaliation for his refusal to lie to the FAA about his medical condition or to withhold material facts about his medical condition in the course of his application for recertification.[1]

Respondents promptly removed the case to the United States District Court for the Southern District of California on the ground that the claim was one to enforce a CBA and that such a claim presented a federal question for which there was jurisdiction in the federal court under 28 U.S.C. § 1331. Respondents then moved to dismiss, contending that the ar-

[1]Petitioner also alleged that, during the course of respondents' terminating him and pressuring him to commit perjury, respondents had intentionally or negligently inflicted emotional distress upon him, had defamed him, and had committed fraud against him. Review is not sought of the dismissal of any of these state law torts, although petitioner will seek damages for emotional distress caused by the retaliatory termination.

bitration remedies provided by the Railway Labor Act ("RLA") for violations of CBAs were the only remedy for alleged breaches of the CBA and that the RLA preempted all of petitioner's state causes of action. Respondents argued that, for preemption purposes, it did not matter whether a claim by an employee depends on the CBA. Rather, relying on a series of cases under both the RLA and the Labor-Management Relations Act ("LMRA"), they asserted that an employee's state law claim is preempted whenever the "conduct" about which an employee was complaining is "governed" by a CBA, whether or not the claim could be prosecuted and won without ever referring to the CBA.

In response, petitioner conceded that the claim under the CBA was precluded by the arbitration provisions of the RLA, and he voluntarily dismissed that claim. However, relying on a Ninth Circuit decision under the Labor-Management Relations Act ("LMRA"), he also argued that state law claims are preempted only when they depend on the CBA, and that all of his claims except the claim for breach of the CBA were independent of the CBA.

The district court agreed with respondents' arguments. It first held that, according to the headnotes of *Carnegie-Mellon v. Cohill*, as reported at 108 S. Ct. 614 (1988), it had jurisdiction to decide the state law claims, notwithstanding the dismissal of the contract claim. App. 10a, 12a. However, the court held that petitioner's claims were preempted in all respects, and it dismissed the complaint, but with leave to amend. App. 10-11a.[2]

---

[2]Because the district judge conceded that he had read only the headnotes and not the text of the decision, App. 12a, he may not have recognized that *Cohill* made the retention of jurisdiction only permissible, not mandatory; in any event, he provided no explanation for his exercise of discretion in this regard. However, because petitioner did not press this

(footnote continued)

Petitioner filed an amended complaint, dropping his contract claim and adding a claim that his heart condition had arisen out of his employment with TWA and that the Federal Employers Liability Act ("FELA") should be extended to cover airline as well as railroad employees.[3] Respondents refiled their motion to dismiss, asserting that petitioner was simply trying, by "artful pleading," to avoid the preemptive force of the RLA, and that the action should be dismissed for the same reasons that the original complaint was dismissed. Petitioner, however, pointed to this Court's recent decision in *Lingle v. Norge*, 486 U.S. 399 (1988), which had held that state law claims of employees were preempted by the LMRA only if they depend on the CBA, and that the mere fact that parallel claims could be brought under both the CBA and, independently, under state law, did not require preemption of the state law claim. He also pointed out that, in *Atchison, Topeka & S.F. Ry. Co. v. Buell*, 480 U.S. 557 (1987), this Court had held that the RLA did not preempt claims under the FELA, and argued that, particularly in light of the Court's reliance on *Buell* in *Lingle*, there was no reason to believe that Congress had intended to bar the states from providing causes of actions to employees covered by the RLA. In their reply, respondents argued that Lingle did not apply because the LMRA had less preemptive force than the RLA, which, it contended, preempts all state law workplace claims, whether or not the CBA is implicated.

The district court agreed with respondents, although it opined that the question was "very close." App. 23a. The

---

point on appeal, but rather took the position that remand to state court was appropriate only if there were no preemption of his state law claims, no question concerning the district court's jurisdiction is being presented here.

[3]This claim, which was dismissed on the ground that the FELA applies only to railroad employees, is also not presented in this petition.

court ruled that "the state law public policy exception to [preemption under] the LMRA" did not apply to the RLA because "the LMRA and RLA dispute mechanisms are different." App. 22a-23a. It also concluded that, because the CBA contained references to the FAA flight certification process, a decision on whether petitioner would have perjured himself by representing that he was fit to fly would necessarily involve "interpretation and application" of the CBA. App. 22a. Accordingly, the action was dismissed with prejudice. App. 18a.

The court of appeals affirmed. It began by deciding that the state law claims were all preempted, distinguishing *Lingle* on the ground that it involved the LMRA rather than the RLA, App. 5a-7a, and distinguishing *Buell* because that case involved a possible conflict between the RLA and a federal statute, rather than a state law cause of action. App. 7a. The court deemed the RLA's preemption more powerful because it supposedly appears on the face of the statute, although section 301's preemptive force was said to be the product of this Court's interpretation. App. 6a. The court also noted that it would be "within the bounds of rationality" for Congress to preempt state but not federal statutes. App. 7a. The court did not, however, provide any reason for believing either that Congress actually intended to give the RLA any more preemptive force than the LMRA, or that Congress intended to preempt state claims, while allowing comparable federal causes of action to proceed.

The court then turned to the question of jurisdiction, holding that, "where a plaintiff's claims are completely preempted by the RLA, a district court has no discretion to remand the claims to a state court." App. 7a-8a. Because petitioner's claims were all based on his wrongful termination, "and therefore were completely preempted by the RLA," the district court's failure to remand was proper. App. 8a.

REASONS FOR GRANTING THE WRIT

The Decision Below Squarely Conflicts With a Decision of This Court and of Other Circuits, and Presents An Important Question of Federal Preemption Law.

1. The question of whether federal labor law, in conjunction with the "just cause" and comparable provisions contained in most collective bargaining agreements, preempts the application of general state laws against retaliatory discharges to unionized employees, is one that has vexed the lower courts and produced sharp differences in the results reached. During the 1987 Term, the Court held that the LMRA, which covers most industries, does not preempt the application of state retaliatory discharge laws to unionized employees. *Lingle v. Norge*, 486 U.S. 399 (1988). The Court there held that the mere existence of a CBA with an arbitration clause was not sufficient to preclude the states from providing an independent cause of action to employees who were terminated for a reason deemed by the state to be contrary to public policy. Under *Lingle* and an earlier case, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), a state claim is not preempted unless it is substantially dependent on the CBA itself, and the fact that a CBA may contain a clause that provides rights parallel to the state claim, *Lingle, supra*, 486 U.S. at 408-410, or that the contract purports to contradict a state law right, *Allis-Chalmers, supra*, 471 U.S. at 211-212, does not suffice to make the state law claim dependent on a possible contractual one, and hence preempted.

The question here is whether the rule of *Lingle* is inapplicable to state law claims of employees who work for airlines and railroads and who are therefore subject to the RLA rather than the LMRA. The lower courts here held that, despite *Lingle*, state law claims are preempted by the RLA whether or not

the CBA is implicated. That position is supported by a few lower court decisions,[4] but is contrary to the rule followed by the great majority of lower courts, which have routinely applied *Lingle* to RLA cases,[5] as well as to this Court's pre-*Lingle*, summary disposition in *Pan American World Airways v. Puchert*, 472 U.S. 1001 (1985), dismissing appeal from *Puchert v. Agsalud*, 677 P.2d 449 (Haw. 1984). In *Puchert*, the state court had held that a retaliatory discharge claim was not preempted by the RLA, and the appeal was based solely on the contention that discharges could be remedied under the CBA and the grievance procedure, and thus that any state claim was preempted by the RLA. *See* Jurisdictional Statement, October Term, No. 83-1952, Questions Presented. This Court held the appeal in abeyance while it considered *Allis-Chalmers v. Lueck*, and then, after *Allis-Chalmers* was decided, it dismissed *Puchert* for want of a substantial federal question. The Court should therefore grant review because of this square conflict among the lower courts and between the decision below and the summary disposition in *Puchert*.

---

[4]*Stevenson v. Forte*, 1989 U.S. Dist. LEXIS 7034, at 8 (M.D. Tenn., March 8, 1989), *aff'd mem.*, 902 F.2d 35 (6th Cir. 1990); *Gendron v. Chicago & NW Transp. Co.*, 190 Ill. App. 3d 301 546 N.E.2d 721 (1989).

[5]*Kidd v. Southwest Airlines*, 891 F.2d 540, 543-545 (5th Cir. 1990); *DeFord v. Soo Line R. Co.*, 867 F.2d 1080, 1086, 1087 (8th Cir. 1989); *Matter of Chicago, Milwaukee R. Co.*, 852 F.2d 960, 965-966 (7th Cir. 1988); *Guzman v. United Airlines*, 1990 U.S. District LEXIS 9390, at 8 (D. Mass., July 20, 1990); *Elliott v. Conrail*, 732 F. Supp. 954, 956-957 (N.D. Ind. 1989); *Roane v. Comair*, 1989 U.S. Dist. LEXIS 707 (E.D. Ky., Janaury 27, 1989); *ALPA v. UAL Corp .*, 699 F. Supp. 1309, 1332 and n.6 (N.D. Ill. 1988), *rev'd on other grounds*, 874 F.2d 439 (7th Cir., 1989); *Adams v. Northwest Airlines*, 48 Emp. Prac. Decis. ¶ 38596 (E.D. Mich. 1988). *See also Beard v. Carrollton RR*, 893 F.2d 117, 122 (6th Cir. 1989) (although "standards under the two statutes may differ," court applies *Lingle* standard to decide that RLA preempts claim if its adjudication "would necessarily involve interpretation" of CBA); *Krashna v. Oliver Realty*, 895 F.2d 111, 113-114 (3d Cir. 1990) (court repeatedly cites RLA cases as authority in section 301 preemption case); *Dibble v. Grand Trunk W.R. Co.*, 699 F. Supp. 123, 127 (E.D. Mich. 1988).

2. Review is also warranted because the court below ignored or, in one case, misread the long line of this Court's plenary decisions that have confined the preemptive effect of the RLA to claims under the CBA. Thus, in *Atchison Topeka v. Buell*, 480 U.S. 557 (1987), the Court applied to the RLA the line of cases that had held that the LMRA, and its strong preference for arbitration of employment disputes under CBAs, does not bar employees from enforcing their rights under other federal laws designed to provide minimum substantive guarantees to individual workers. 480 U.S. at 565, citing *Barrentine v. Arkansas Best Freight System*, 450 U.S. 728 (1981). The court below distinguished Buell on the ground that the preemption that was rejected there was preemption of federal rights (there, under the FELA), while this case involves a state right (the right not to be fired for refusing to commit perjury). App. 7a.

The court below expressed the view that Congress could rationally choose to preempt state laws while not preempting federal laws, App. 7a, but it never explained why it believed that Congress had actually chosen to give state laws such disfavored treatment. Certainly, there is no reason to believe that labor relations are any more complex, and thus more in need of being sheltered from state laws providing minimum protections to employees, in the railroad or airline industries than in the laundry machine manufacturing business that was at issue in *Lingle*. Indeed, given the fact that in preemption cases "the ultimate touchstone" is Congressional intent, *Allis-Chalmers Corp. v. Lueck, supra*, 471 U.S. at 208, and given the strong presumption against finding Congressional intent to preempt state laws, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981), the burden was on the proponents of preemption to demonstrate Congressional intent to single out railroad and airline employees for greater preemption. Respondents have made no showing that Congress in-

tended to preempt the state law claims of the pilot of a commercial airline that he was discharged for refusing to submit false information to the FAA, when the same claims of a pilot of the corporate jet for General Motors executives would not be preempted.

In addition to *Puchert*, other decisions of this Court strongly suggest that the RLA does not preempt state law claims. Thus, in *Lingle* this Court held that the *Barrentine* line of cases, which involve federal laws, applied to bar LMRA preemption of state as well as federal claims. Not only is there no reason to believe that RLA preemption should be given any broader scope, but the *Lingle* Court invoked *Buell* as one of the cases barring preemption of federal rights that pointed in the direction of allowing independent state law rights to survive as well.

Moreover, in *Colorado Anti-Discrimination Comm. v. Continental Air Lines*, 372 U.S. 714, 724 (1963), the Court held that the RLA did not bar the states from enforcing their nondiscrimination laws to provide a remedy to employees who have been subjected to racial discrimination by their employers. *Colorado Commission* was the first in the line of cases that leads down through *Barrentine* and *Buell* to *Lingle*, in which the Court has routinely permitted the enforcement of both state and federal rights by employees who are covered by both the LMRA and the RLA, contrary to the ruling below.

3. Review is further warranted because the court below completely misunderstood the relationship between the RLA and LMRA policies regarding preemption of state law claims. The court of appeals thought that preemption was warranted under the RLA even though, in identical circumstances, there would be no preemption under the LMRA, because Congress' intent to preempt is "clear" on the face of the RLA, while it is only the product of judicial interpretation under the LMRA. App. 6a.

This analysis represents bad history and well as bad logic. It is bad history because, contrary to what now appears "clear" to respondents on the face of the RLA, early decisions under the RLA held that RLA employees could enforce even their contractual rights under state law, so long as they sought damages instead of reinstatement. *E.g., Moore v. Illinois Central R. Co.*, 312 U.S. 630 (1941). That proposition was upheld for thirty years until *Moore* was overruled in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972). Of particular note is the fact that the *Andrews* Court drew its preemption analysis from the series of cases under LMRA section 301 that held that federal law governs the enforcement of CBAs and that, in state as well as federal court, contractual disputes must be submitted to the grievance and arbitration procedure for resolution. Respondents and the courts agreeing with them have offered no explanation of why, having drawn its inspiration from the LMRA, RLA preemption of state law should suddenly go its own separate way after LMRA preemption has been held to be narrower than some employers might desire.

Nor is there any sound reason for concluding that RLA preemption is any clearer on the face of the statute than LMRA preemption. It is true that, as *Andrews* noted, the RLA expressly provides for arbitration of contractual disputes, but the LMRA also expresses a very strong federal labor policy in favor of such dispute resolution procedures. LMRA Section 203(d), 29 U.S.C. § 173(d). As Judge Posner has explained, the proposition that the RLA more strongly favors arbitration than the LMRA ignores the fact that almost all CBAs covered by the LMRA provide for arbitration and that, as a practical matter, "the [arbitration] remedy becomes by force of section 301 exclusive, just like the arbitral remedies established by the [RLA]. It is therefore hard to see why that Act should have more preemptive force than the National

Labor Relations Act." *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807, 816-817 (7th Cir. 1985). Because neither statute explicitly preempts state law claims, it is difficult to understand the basis of the "clarity" argument.

* * *

For all these reasons, there is considerable doubt that Congress intended to single out railroad and airline employees and preclude the states from protecting the workplace rights of such employees when they have chosen to be represented by a union, on the theory that the law of the CBA essentially supersedes any protections that the state may choose to provide. This petition presents an extremely important question of federal labor relations law and of federalism generally. The Court should grant review in this case in order to better define the limits that federal law imposes on state exercise of the police power with respect to the workplace rights of railroad and airline employees who are represented by a union.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Howard D. Finkelstein

Finkelstein & Associates
Suite 400
1495 Pacific Highway
San Diego, California 92101
(619) 238-1333

Attorneys for Petitioner

September 12, 1990

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRIS A. GROTE,
Plaintiff-Appellant,

v.

TRANS WORLD AIRLINES, INC.; FRED VANHOOSEN; DOUGLAS HEGGIE; LAWRENCE MARINELLI, M.D.; BRADFORD BERG,
Defendants-Appellees.

No. 89-55262
D.C. No. CV-87-1459-R
OPINION

Appeal from the United States District Court
for the Southern District of California
John S. Rhoades, District Judge, Presiding

Argued and Submitted
April 10, 1990—Pasadena, California

Filed June 14, 1990

Before: Alfred T. Goodwin, Chief Judge, Thomas Tang and Robert Boochever, Circuit Judges.

Opinion by Judge Boochever

SUMMARY

Labor

Affirming the district court's judgment of dismissal, the court of appeals held that an airline pilot's wrongful discharge complaint, arguably governed by a collective bargaining

agreement, is preempted by the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982).

Appellant Harris Grote, a former pilot of appellee Trans World Airlines, filed a complaint in California Superior Court alleging wrongful termination, breach of the covenant of good faith and fair dealing, intentional and negligent infliction of emotional distress, defamation, and fraud. Grote contended that after he suffered a heart attack on duty, that TWA asked him to perjure himself to the Federal Air Surgeon to get recertified to resume his pilot duties. Grote claimed that his refusal to do so, resulted in his termination. After Grote's claim was removed to the district court because it involved the interpretation of a TWA CBA and therefore arose under the RLA, Grote voluntarily dismissed his breach of contract claim and requested remand to state court. The district court dismissed all causes of action without prejudice, stating that the entire claim was preempted by the RLA. Grote then amended his complaint and made an additional complaint under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982), but the district court dismissed all claims with prejudice because each cause of action was preempted by the RLA. Grote appealed.

[1] The RLA preempts state tort claims by employees against their employers for wrongful discharge or for intentional infliction of emotional distress, where the alleged tortious activity is arguably governed by the CBA and where the gravamen of the complaint is wrongful discharge. [2] Grote complained that TWA required him to perjure himself to the Federal Air Surgeon in order to obtain medical certification. Paragraph 16(I) of the CBA in this case deals with TWA's ability to require any of its pilots to maintain a current medical certificate. [3] Because Grote's state law claims are at least arguably governed by the CBA and because they are implicitly founded on a wrongful termination claim, they are completely preempted by the RLA and this preemption justifies the district court's refusal to remand Grote's state law claims

to state court. The court similarly rejected Grote's contention that the FELA is or should be made applicable to airline employees. Congress has not, in fact, extended the FELA to airline employees, and the failure to do so does not violate equal protection.

COUNSEL

Howard D. Finkelstein, Finkelstein & Associates, San Diego, California, for the plaintiff-appellant.

L.B. Chip Edleson and Fred M. Plevin, Gray, Cary, Ames & Frye, San Diego, California, for the defendants-appellees.

OPINION

BOOCHEVER, Circuit Judge:

Harris A. Grote appeals the district court's grant of Trans World Airlines' (TWA) motion to dismiss his first amended complaint with prejudice. Because Grote's claim is pre-empted by the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188 (1982), we affirm.

FACTS

On March 12, 1987, Grote, a former TWA pilot, filed a complaint against TWA, *et al.*, in California Superior Court alleging wrongful termination, breach of the covenant of good faith and fair dealing, breach of contract, intentional and negligent infliction of emotional distress, defamation, and fraud. Grote claims that he suffered a mild heart attack while on duty, and six subsequent incidents of chest pain. His complaint alleged that TWA asked him to perjure himself to the Federal Air Surgeon in order to get recertified to resume his

pilot duties.[1] Grote claims that his refusal to do so resulted in his termination.

Grote's action was removed to district court because it involved the interpretation of a TWA collective bargaining agreement, and therefore arose under the RLA, 45 U.S.C. §§ 151-188.[2] TWA then filed a motion to dismiss Grote's claims. In opposition to this motion, Grote voluntarily dismissed his breach of contract claim and requested remand to the state court. Grote claimed that only the breach of contract cause of action implicated the collective bargaining agreement, and that without it there was no longer a basis for federal jurisdiction. The district court disagreed and dismissed all causes of action without prejudice, stating that the entire claim was preempted by the RLA.

Grote subsequently filed an amended complaint claiming breach of the covenant of good faith and fair dealing, intentional and negligent infliction of emotional distress, and defamation. Grote made an additional claim under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1982). The district court dismissed all claims with prejudice because "each cause of action is preempted by the Railway Labor Act." Grote's timely appeal presents three questions: 1) Whether his state law claims are preempted by the RLA; 2) Whether his original complaint should have been remanded to state court after the removal of the breach of contract cause of action; and 3) Whether he has a cause of action under the FELA.

---

[1]TWA denies this allegation, but for the purpose of this appeal from the dismissal of the complaint, we must accept it as true. *Simon Oil Co. v. Norman*, 789 F.2d 780, 781 (9th Cir. 1986).

[2]"All of the provisions of subchapter I of [the RLA] . . . are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce . . . ." 45 U.S.C. § 181 (1982).

DISCUSSION

"A dismissal for failure to state a claim . . . is a ruling on a question of law and is subject to *de novo* review." *Kelson v. City of Springfield*, 767 F.2d 651, 653 (9th Cir. 1985).

1. *RLA Preemption*

[1] In *Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1281 (9th Cir. 1986), we restated our earlier holding that "the RLA preempts state tort claims by employees against [their employers] for wrongful discharge or for intentional infliction of emotional distress, where the alleged tortious activity is ' "arguably" governed by the collective bargaining agreement . . .' and where 'the gravamen of the complaint is wrongful discharge.' " *Id.* at 1290 (quoting *Magnuson v. Burlington N., Inc.*, 576 F.2d 1367, 1369-1370 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978)).

[2] Grote complains that TWA required him to perjure himself to the Federal Air Surgeon in order to obtain medical certification. Paragraph 16(I) of the instant collective bargaining agreement deals with TWA's ability to require any of its pilots to maintain a current medical certificate. Thus, the subject of Grote's claim is at least "arguably governed" by paragraph 16(I) of the agreement. *Lewy*, 799 F.2d at 1290. Furthermore, because Grote's entire claim is in response to an alleged wrongful termination (as illustrated by his original complaint in which wrongful termination was the first cause of action), "the gravamen of [Grote's] complaint is wrongful discharge." *Id.* Therefore, according to *Lewy*, Grote's action is preempted by the RLA.

Grote cites *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), in support of his argument that he can seek a state law remedy as long as it is " 'independent' of the collective-bargaining agreement." *Id.* at 407. The Court in *Lingle* held that, even though § 301 of the Labor-

Management Relations Act (LMRA) preempts state law claims arising under collective bargaining agreements, a state claim independent of the agreement could be made. *Lingle*, 486 U.S. at 407. *Lingle*, however, is inapposite because it deals with preemption under § 301 of the LMRA, 29 U.S.C. § 185.

The preemption created under the RLA and that arising under § 301 of the LMRA are not analogous. The RLA dispute resolution provisions were enacted specifically

> [t]o *avoid any interruption* to commerce or to the operation of any carrier engaged therein; . . . to provide for the *prompt and orderly* settlement of all disputes concerning rates of pay, rules, or working conditions; . . . [and] to provide for the *prompt and orderly* settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 151a (emphasis added). In drafting this section of the RLA, Congress made clear its interest in keeping railroad labor disputes simple and out of the reach of the often lengthy court process.

Section 301 of the LMRA, on the other hand, merely states that "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States." 29 U.S.C. § 185(a) (1982). On its face, § 301 creates concurrent state and federal jurisdiction over specified labor disputes. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1962). It was not until the Supreme Court's decision in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), that § 301 was interpreted as barring state law claims. *Id.* at 103. Therefore, because the RLA's preemptive force appears on the face of the statute and § 301 preemption is judicially imposed, we conclude that preemption under the

RLA is broader than under § 301. Grote's analogy to *Lingle*, which discusses an exception to § 301 preemption, is therefore unpersuasive.

Grote also relies on *Atchison, T. & S. F. Ry. v. Buell*, 480 U.S. 557 (1987), which states that an employee governed by the RLA can sue his employer if the claim " 'is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.' " *Id.* at 565 (quoting *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737 (1981)). In his brief, Grote alleges that his "minimal substantive guarantees," *id.*, were violated through his "wrongful discharge, as well as [TWA's] intentional and negligent infliction of emotional distress, and defamation, [which] constitute tort claims under *state* law." (Emphasis added.) *Buell*, however, empowered an employee to bring claims arising only under *federal* law. Because Grote is attempting to salvage his state law claims, his reliance on *Buell* is misplaced.

It stands to reason that Congress can, within the bounds of rationality, enact a statute overriding part or all of any other federal statute. The decision in *Buell* is the product of Congress' power to limit the ambit of its own laws. Hence, the court in *Buell* allowed an employee governed by the RLA to sue his employer based on a federal statute, despite the RLA's provisions for alternate dispute resolution.

It is quite different, however, to allow a state claim to undermine a federal statute barring that type of claim. Such a decision would rob Congress of any real preemptive power. Because Grote sought to circumvent congressional preemption with state causes of action, the district court's dismissal of his claims was justified.

2. *Failure to Remand*

When a plaintiff's claims are completely preempted by the RLA, a district court has no discretion to remand the claims

to a state court. *Price v. PSA*, 829 F.2d 871, 874-76 (9th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988). All of Grote's state law claims were implicitly based on a claim of wrongful termination, and therefore were completely preempted by the RLA. *Lewy*, 799 F.2d at 1290. We therefore hold that the district court did not err in failing to remand Grote's complaint.

3. *Federal Employers' Liability Act*

The FELA states that "[e]very common carrier by *railroad* while engaging in [interstate] commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier." 45 U.S.C. § 51 (emphasis added). Grote contends that by bringing the "airline industry under the dictates of the RLA by amendment thereto," Congress intended to give the airline industry all of the benefits entitled to the railway industry, and that he too, therefore, may state a claim pursuant to the FELA. We disagree.

When Congress extended the application of the RLA to the airline industry in 1936, *see* 45 U.S.C. § 181, it expressly limited this extension to parts of Title 45, chapter 8. The FELA appears in chapter 2 of Title 45, and is therefore not included in this extension. Had Congress intended the FELA to apply to air carriers, it was perfectly capable of so providing. Grote cannot now ask this court to amend the FELA in a way that he wishes Congress had. As the statute stands today, Grote has no claim under the FELA.

Grote argues that to provide the protection of the FELA to railroad employees but not to airline employees would violate the equal protection clause. Because the challenged classification does not "interfere[ ] with the exercise of a fundamental right or operate[ ] to the peculiar disadvantage of a suspect class," the statute withstands scrutiny if it has some rational basis. *Brandwein v. California Bd. of Osteopathic Examiners*, 708 F.2d 1466, 1470 (9th Cir. 1983). Grote's bald allegation that a statute violates equal protection is insufficient to shift

the burden of proof to the party defending the statute's validity. Instead, "legislative Acts adjusting the burdens and benefits of economic life come to [this c]ourt with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). We see no reason why this same burden should not apply to Grote's equal protection claim. Grote has failed to meet that burden of "establish[ing] that the legislature has acted" irrationally. *Usery*, 428 U.S. at 15. In fact, Grote, in his brief, attempts to shift the burden entirely onto TWA to show that such a denial *is* rational. "Defendants cannot point to any basis which would render a classification differentiating between the rights of railroad workers and airline workers for protection against tortious conduct under the FELA non-arbitrary." [Blue br. at 25] In attempting to deflect the burden onto TWA, Grote has failed to satisfy his own burden of showing irrationality.

CONCLUSION

[3] Because Grote's state law claims are at least arguably governed by the collective bargaining agreement, and because they are implicitly founded on a wrongful termination claim, they are completely preempted by the RLA. This preemption justifies the district court's refusal to remand Grote's state law claims to state court. We similarly reject Grote's contention that the FELA is or should be made applicable to airline employees. Congress has not, in fact, extended the FELA to airline employees, and we do not find that its failure to do so violates equal protection. The district court's dismissal of Grote's complaint with prejudice is therefore

AFFIRMED.

HARRIS A. GROTE, Plaintiff, vs. TRANS WORLD AIRLINES, INC.,; FRED VANHOOSEN; DOUGLAS HEGGIE, LAWRENCE MARINELLI, M.D.; BRADFORD BERG; and DOES 1 through 100, inclusive, *Defendants*.	) Case No. 871459 R (IEG))) ORDER GRANTING PLAINTIFF'S) REQUEST TO VOLUNTARILY) DISMISS THE THIRD CAUSE) OF ACTION; AND GRANTING) DEFENDANT'S MOTION TO) DISMISS ALL CAUSES OF) ACTION)))) FILED: April 26, 1988

The motion of defendants TRANS WORLD AIRLINES, INC. ("TWA") and LAWRENCE MARINELLI, M.D. (collectively, the 'defendants') to dismiss all causes of action of plaintiff's complaint came on regularly for hearing on April 4, 1988 at 10:30 a.m. in this Court, the Honorable John S. Rhoades presiding. Plaintiff appeared through his counsel, Howard D. Finkelstein. Defendants appeared through their counsel, Fred M. Plevin.

After fully reading and considering all papers filed in support of and in opposition to this motion, and after considering the oral argument of both parties, this Court finds that:

1. The case was properly removed from the Superior Court of San Diego to this Court;

2. This Court has subject matter jurisdiction over this claim and has the authority to rule upon defendants' motion to dismiss;

3. Plaintiff's complaint, and each cause of action, is preempted by the Railway Labor Act, 45 U.S.C. section 151, et seq.

The grounds for these findings are more specifically set forth in the court's oral ruling issued from the bench at the hearing on this matter, which is incorporated herein by this reference.

Therefore, IT IS HEREBY ORDERED:

Defendants' motion to dismiss all causes of action of the complaint is hereby GRANTED without prejudice. Plaintiff shall file a first amended complaint within thirty days of the entry of this order.

APPROVED AS TO FORM:

Dated: 4-20-88

L. B. CHIP EDLESON
KATHLEEN K. JENKINS
FRED M. PLEVIN
By: /s/_____
FRED M. PLEVIN
Attorneys for Defendants
TRANS WORLD AIRLINES, INC.
and LAWRENCE MARINELLI,
M.D.

OF COUNSEL:
GRAY, CARY,
AMES & FRYE

Dated: April 21, 1988

HOWARD D. FINKELSTEIN
By: /s/_____
HOWARD D. FINKELSTEIN
Attorney for Plaintiff
HARRIS A. GROTE

ORDER

IT IS SO ORDERED.

Dated:_____

John S. Rhoades
JOHN S. RHOADES
United States District Judge

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HARRIS A. GROTE,	CIVIL CASE NO. 87-1459-R
PLAINTIFF,	PRETRIAL SCHEDULING
	ORDER AND HEARING
V.	DEFENDANT'S MOTION
	TO DISMISS ALL CAUSES
TRANS WORLD AIRLINES,	OF ACTION
INC.,. ET AL,	SAN DIEGO CALIFORNIA
DEFENDANTS.	APRIL 4, 1988
	10:30 A.M.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JOHN S. RHOADES
UNITED STATES DISTRICT JUDGE

The Court: All right. I'll advise you then when I exercise my discretion. And I'm going to decide the case. So we'll get to the second, the main issue as to whether there's been a preemption or not.

* * *

The Court: All right. Based on the case, and I haven't read it carefully, but I read the headnotes in that Carnegie case, Carnegie-Mellon versus Cohill, 108 S.Ct. 614. I will determine that I have the jurisdiction to decide the question before me today. I've read all the papers in the case, and I wish to compliment counsel on both sides, and also the plaintiff for his complaint, for the excellent work that has been presented to me. It's a very, very difficult question.

Judge Wisdom in the case of *Olguin versus Inspiration Consolidated Copper Company*, 740 F.2d 1468 at 1475, a 1984

Ninth Circuit case, along with Judges, I believe it was Judge Wallace and Anderson, comments, I'd like to quote from it, and I'm going to take a little time with this ruling, because I'd like to have you understand where I am. I will confess I've been on both sides of this question many times, back and forth, back and forth, I really had a very, very difficult time with it. And whatever I do today very well might be decided by the Ninth Circuit to be wrong. But I would anticipate, and expect, an appeal from what I'm doing.

Labor preemptions, I'm quoting from Judge Wisdom, labor preemptions are conflicts and confused areas of the law. Preemption is a matter of Congressional intent that the labor statutes provide little or no guidance as to what aspect of state law Congress intended to preempt. Cases cited. Because federal law does not cover every dispute that can arise out of employment or union relationship total preemption is impossible. There's a case cited. At the same time some preemption is essential to prevent state laws interfering with fundamental federal policies. Case cited. The courts have thus been required to resolve a body of preemption doctrines based on legislative history and judicial conceptions of what federal labor policy requires. Essentially in any preemption case the court must attempt to weigh the state's interest against those of federal policy. The courts' approaches to the problem have not always been consistent, however, nor have the results always been fully reconcilable. Congress has criticized the judicial decisions, but have provided no clear consensus on an alternative approach.

So, for whatever it's worth Judge Wisdom makes me feel better, he was as confused as I am as to what's going on.

I've read all the papers submitted by the parties, and I've considered their arguments and their authorities and I'm ready to rule.

The defendant's motion to dismiss is granted.

Plaintiff's claims are preempted by the Railway Labor Act, 45 U.S. Code section 151 et seq. The RLA provides for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. 41, United States Code, section 151a(a). Such disputes are known as 'minor disputes' and the firing of an individual worker allegedly for cause is a classic illustration. *Lewy versus Southern Pacific Transportation Company*, 799 F.2d 1281 at 1290. The Ninth Circuit 1986 case, citing *Graf versus Elgin, Joliet and Eastern Railway Company*, 790 F.2d 1341, 1348, Seventh Circuit 1986. The RLA mandates minor disputes be resolved exclusively by resort to arbitration and grievance procedures, *Andrews versus Louisville & Nashville Railroad Company*, 406 U.S. 320 at 325, 1972 case. Plaintiff's action is a minor dispute arguably governed by the collective bargaining agreement and is preempted. *Magnuson versus Burlington Northern, Inc.*, 576 F.2d 1367, 1369 and 70, a Ninth Circuit 1978 case.

The United States Supreme Court has recognized exceptions to the preemption doctrine under the Labor Management Relations Act for activity that is merely of peripheral concern to the labor act or deeply rooted in local feeling. *Farmer versus Carpenters*, 430 U.S. 290 at 296, a 1977 case. RLA preemption has been analyzed under LMRA case law. See *Magnuson* at 1369, and *DeTomaso versus Pan American World Airways, Inc.*, 43 Cal.3d 517, a 1987 case. The relevant analysis is whether the California tort action 'as applied here confers non-negotiable state-law right on employers or employees independent of any right established by contract, or, instead whether evaluation of the tort claim is inextricably interwined with consideration of the terms of the labor con-

tract. That's from *Allis-Chalmers versus Lueck*, 471 U.S. 202 at 211, a 1985 case. Although plaintiff's claim can be characterized as state tort claims for wrongful treatment for his refusal to commit perjury under *Tameny versus Atlantic Richfield Company*, Cal.3rd 167, a 1980 case, and *Petermann versus International Brotherhood of Teamsters*, 174 Cal.app. 2d 184, a 1959 case, his claims are not sufficiently unrelated to the collective bargaining agreement to avoid preemption under the public policy exception to LMRA preemption propounded in *Garibaldi versus Lucky Food Stores Inc.*, 726 F.2d 1367, a Ninth Circuit 1984 case. See also the *Young versus Anthony Fish Grottos*, 830 F.2d 993 a Ninth Circuit 1987 case, and *Paige versus Kaiser*, 826 F.2d 857 a Ninth Circuit 1987 case.

Each cause of action in Mr. Grote's complaint alleges a violation of the collective bargaining agreement. It would not be possible to resolve the merits of this dispute solely by construing the statutes and public policy allegedly contravened.

There is no deeply rooted local feeling strong enough to compel a state court action. Grote has not identified any state statute which has been violated and it is best conjectural that Congress intended to provide an exception to RLA preemption for a violation of the public policy underlying the federal aviation program. 49 United States Code section 1301 and following. Even if California adopted this policy to protect the health and safety of its citizens, see the *Olguin* case at page 1475, but also see *Authier versus Ginsberg*, 757 F.2d 796 at 798, note 2, a Sxith Circuit 1985 case, California's interest in enforcing its perjury statute, Penal Code section 118, or enforcing 1001, Title 18, does not outweigh the competing federal objective of the RLA to arbitrate minor disputes. Air travel safety is federally regulated and to except Mr. Grote's state claims from preemption based on California's interest

in keeping the skies safe would frustrate the effective implementation of the RLA.

Accordingly, defendants' motion to dismiss is granted. Again, this is a very close question, I'd be interested to see what the Ninth Circuit does.

The defendant will prepare the order, approved as -- including the reasons this Court has set forth, in making specific reference to this oral ruling, and submit it to the Court approved as to form by the plaintiff, and submit to the Court within 15 days.

Mr. Finkelstein: Your Honor, if I might, and I'm not sure exactly what has been represented by the Court's ruling, but to the extent the plaintiff could conceivably amend the complaint to state a more specific cause of action in the area that I think your Honor is concerned about, we would ask that the Court consider allowing the plaintiff to do so.

The Court: All right. The dismissal is without prejudice. You have thirty days to file an amended complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HARRIS A. GROTE,	) Case No. 871459 R (IEG)
	)
Plaintiff,	) ORDER GRANTING
	) DEFENDANTS' MOTION TO
vs.	) DISMISS ALL CAUSES
	) OF ACTION WITH PREJUDICE
TRANS WORLD AIRLINES, INC.,; FRED VANHOOSEN; DOUGLAS HEGGIE, LAWRENCE MARINELLI, M.D.; BRADFORD BERG; and DOES 1 through 100, inclusive,	)
Defendants.	)

The motion of defendants TRANS WORLD AIRLINES, INC. ("TWA"), LAWRENCE MARINELLI, M.D., DOUGLAS HEGGIE and FRED VANHOOSEN, (collectively, the 'defendants') to dismiss all causes of action of plaintiff's first amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure came on regularly for hearing on December 5, 1988 at 10:30 a.m. in this Court, the Honorable John S. Rhoades presiding. Plaintiff appeared through his counsel, Howard D. Finkelstein. Defendants appeared through their counsel, Fred M. Plevin.

After fully reading and considering all papers filed in support of and in opposition to this motion, including papers filed in connection with defendants' prior motion to dismiss, and after considering the oral argument of both parties, this Court finds that plaintiff's first amended complaint, and each of cause of action, fails to state any claim upon which relief may be granted, since the first amended complaint, and each cause of action is preempted by the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

The grounds for this ruling are more specifically set forth in the Court's oral ruling issued from the bench at the hearing on this matter, which is incorporated herein by this reference.

Therefore, IT IS HEREBY ORDERED:

Defendants' motion to dismiss all causes of action of the first amended complaint is hereby GRANTED WITH PREJUDICE. Judgment shall be entered in favor of defendants forthwith.

APPROVED AS TO FORM:

Dated: December 21, 1988

L. B. CHIP EDLESON
KATHLEEN K. JENKINS
FRED M. PLEVIN

By: /s/_____
FRED M. PLEVIN
Attorneys for Defendants
TRANS WORLD AIRLINES, INC.,
LAWRENCE MARINELLI, M.D.,
DOUGLAS HEGGIE, and
FRED VANHOOSEN

OF COUNSEL: GRAY, CARY, AMES & FRYE

Dated: Dec. 12, 1988

HOWARD D. FINKELSTEIN

By: /s/_____
HOWARD D. FINKELSTEIN
Attorney for Plaintiff
HARRIS A. GROTE

ORDER

IT IS SO ORDERED.

Dated: 1-3-89

John S. Rhoades
JOHN S. RHOADES
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HARRIS A. GROTE, PLAINTIFF,	CIVIL CASE NO. 87-1459-R (IEG)
	DEFENDANT'S MOTION TO DISMISS FIRST AMENDED
V.	COMPLAINT
TRANS WORLD AIRLINES, INC., ET AL, DEFENDANTS.	SAN DIEGO CALIFORNIA DECEMBER 5, 1988 10:30 A.M.

TRANSCRIPT OF PROCEEDING
BEFORE THE HONORABLE JOHN S. RHOADES
UNITED STATES DISTRICT JUDGE

THE COURT: Okay. I've read the papers submitted by the parties, heard their oral arguments, and considered their factual and legal points. I've also read the papers that we had from the previous hearing. The defendant's motion to dismiss the first amended complaint is granted with prejudice.

The Federal Employer's Liability Act, 45 United States Code, Section 51, gives railroad workers the right to bring tort actions against 'common carriers by railroad'. Plaintiff tries to argue that this statute also applies to airlines to save his complaint. This is not the case. The initial FELA was passed in 1906 to give certain workers chance to recover for tort damages when they were injured on the job. *Atchison, Topeka & Santa Fe versus Buell,* 107 S.Ct. 1410 at 1413, a 1987 case. However, the Supreme Court struck down the 1906 FELA because it was overbroad; it applied to intrastate as well as interstate commerce. Therefore, in 1908 Congress enacted a new FELA, this one applying only to railroads and railroad

workers. That's in note 5 of the *Buell* case. "It is clear that in limiting the statute of 1908 to common carriers by railroad Congress endeavored to avoid one of the constitutional objections made to the Act of 1906. The expression 'by railroad' is but descriptive of the kind of common carriers to which the statute relates, distinguishes them from common carriers of other classes to which the Act does not extend, and describes the kind of employers and employees who are respectively charged with its provisions, under the power of Congress to make such classifications and distinctions." *Erie Railroad versus Jacobus*, 221 F. 335, at 337, a 1915 case. The 1908 FELA therefore covered only railroads and not "common carriers of other classes".

In 1939 Congress amended the FELA. However, this amendment did not expand its scope of applicability. The Supreme Court even refused to modestly extend it to include refrigerator car companies, finding that Congress would have passed legislation to include those companies in the FELA had it intended to do so. *Edward versus Pacific Fruit Express*, 390 US 538 at 541, a 1968 case.

Accordingly, federal appellate courts have also restricted FELA to railroads. In particular, the Ninth Circuit has found that 'to come within the scope of coverage under FELA, the following elements must be present: the employee must be employed by a common carrier by railroad,' as the term used in the FELA means, 'one who operates a railroad as a means carrying for the public, that is to say, a railroad company acting as a common carrier.' *Pickney versus Oro Dam Constructors*, 441 F.2d 806 at 808, Ninth Circuit 1971.

Therefore, the FELA cannot help plaintiff in this case since his case concerns an airline, not a railroad.

Plaintiff also argues that the state law public policy excep-

tion to the Labor Management Relations Act also applies to the Railroad Labor Act. Since California public policy interests are involved in this case, plaintiff argues that it cannot be dismissed because of this exception.

However, the LMRA and RLA dispute mechanisms are different. The RLA has made any, and I underline any, grievance arising out of the collective bargaining agreement subject to the exclusive arbitration remedies in the RLA. *Jackson versus Consolidated Rail,* 717 F.2d 1045 at 1052, Seventh Circuit 1983, cert. denied at 465 US 1007. Here, plaintiff claims that TWA would have required him to rely on the seriousness of his heart condition to regain his FAA medical certificate, thereby violating California perjury laws. If he were to resume flying plaintiff also claims that he would have been an air safety hazard, which violates California aviation laws.

Deciding if plaintiff would have indeed perjured himself by representing that he was fit to fly, and if he would have posed a safety hazard had he resumed flying, would involve interpretation and application of Section 16(I) of the TWA-Union collective bargaining agreement in this case. This is something that Congress has committed to the LRA arbitration mechanism for resolution. See *Lewy versus Southern Pacific,* 799 F.2d 1281, 1290, Ninth Circuit 1986.

There's also a state interest test in RLA cases. Under the RLA, courts 'must examine the state interest in regulating the conduct in question and the potential for interference with the federal regulatory scheme'. *Jackson* at page 1053. If, however, the state interests involved are inextricably intertwined 'with the collective bargaining agreement, then the federal interests in resolving the dispute under RLA mechanism outweigh the state interests'. *Beers versus S.P.* 703 F.2d 425, 428, Ninth Circuit 1983; *Magnuson versus Burlington Northern,* 576 F.2d 1367 at 1369, Ninth Circuit 1978,

cert. denied 439 US 930. As seen above, deciding plaintiff's claims of violations of state interest is inextricably intertwined with the collective bargaining agreement. This balancing test therefore does not help the plaintiff.

And I decline to accept the plaintiff's suggestion that I substitute my judgment as that for Congress, because of Congress' exclusive prerogative.

For the foregoing reasons plaintiff's first amended claim is dismissed with prejudice. The defendant will prepare the order, making specific reference to these oral remarks, submit it as to for within 15 days.

I wish again, to commend the plaintiff, and also counsel for the excellent work in the presentation. It's a very close one, I'll concede. And I do appreciate the work that was done.